A

SAABANI KIGONGOBERO & ANOR

v.

PP & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEALS NO: W-05-287-11-2012 &
C W-05-288-11-2012]
17 FEBRUARY 2014

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Accused persons arrested during police surveillance - 1,410.8g*
D *methamphetamine seized - Charge under s. 39B(2) Dangerous Drugs Act 1952 - Whether there was common intention to traffic drugs - Whether accused persons had knowledge of drugs - Whether conduct of accused persons during arrest constituted mens rea possession - Whether defence probable*

E

CRIMINAL LAW: *Dangerous drugs - Trafficking in - Accused persons arrested during police surveillance - 1,410.8g methamphetamine seized - Charge under s. 39B(2) Dangerous Drugs Act 1952 - Appeal against conviction and sentence - Whether conduct of accused persons during arrest*
F *constituted mens rea possession - Whether defence probable - Whether non-calling and non-offering of material witness warranted invocation of s. 114(g) Evidence Act 1950 - Whether there was break in chain of evidence*

EVIDENCE: *Adverse inference - Failure to call material witness -*
G *Accused persons arrested during police surveillance - 1,410.8g methamphetamine seized - Charge under s. 39B(2) Dangerous Drugs Act 1952 - Defence that accused persons had no knowledge of drugs - Allegation that sample of drugs collected from one person and made aware to material witness - Non-calling of material witness - Whether non-calling*
H *and non-offering of material witness warranted invocation of s. 114(g) Evidence Act 1950*

Surveillance was carried out by a team of police at a hotel and the appellants and the third accused were spotted coming out of
I the hotel. The first and second appellants were seen carrying pink and black plastic bags, respectively, while the third accused was seen walking behind the two men. The three boarded a taxi and

the police tailed the taxi until it stopped in front of a row of shop houses where they were then arrested. Four and two packages were discovered from the pink and black bags, respectively. Four pairs of sandals were recovered from the two bags and underneath the sandals, the police found a layer from where eight yellow packages wrapped with cellophane tape were recovered. The eight packages contained substances which were later confirmed by the chemist to be methamphetamine. The methamphetamine recovered from the pink and black bags each weighed 683.7g and 727.1g, respectively. Both the appellants and the third accused were charged under s. 39B(2) of the Dangerous Drugs Act 1952 for the offence of trafficking in dangerous drugs. At the end of the prosecution's case, the trial judge found that the element of common intention had not been proved and the third accused was acquitted and discharged. However, the trial judge found that the prosecution had proven a *prima facie* case against the appellants. The first appellant's defence was that he had no knowledge of the drugs; and that he had collected the sample from one Christina as requested by one Emmky and Vincent, who was Emmky's brother-in-law, was aware of this. The second appellant, on the other hand, denied knowing neither Emmky nor Christina. It was the appellant's contention that they had met by chance and the second appellant had agreed to come along with the first appellant. The trial judge made a finding of *mens rea* possession by relying on the conduct of the appellants to infer that they had knowledge of the drugs. It was further held that the defence had failed to raise a reasonable doubt on the prosecution's case and the trial court convicted the appellants for the offence and sentenced them to death. Hence, the present appeal. The issues brought forth by the first appellant were (i) whether the trial judge had made a correct finding of inference of knowledge upon the first appellant based on conduct; (ii) the trial judge erred in law and in fact in finding that the defence was an afterthought and a recent invention; (iii) the invocation of s. 114(g) of the Evidence Act 1950 ('the Act') by the non-calling and non-offering of Vincent; and (iv) the identity of exhibits and s. 34 of the Penal Code. The second appellant's complaint was that the trial judge had failed to appreciate the defence of the second appellant that he had merely accompanied the first appellant to the hotel.

A B C D E F G H I

Held (allowing appeals and setting aside convictions; acquitting and discharging appellants)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) In a situation where the police had suddenly pounded on the first appellant in the taxi, it would be reasonable to expect the first appellant to display reaction of shock. Such conduct alone was not sufficient to infer the first appellant's knowledge of drugs. As for the second appellant, there was no evidence led to suggest any situation that made it impossible for the second appellant to run away from the police. There was no basis for the trial judge to make a finding that the second appellant could not run away because the situation made it impossible for him to do so. (paras 20 & 21)

(2) The trial judge had seriously misdirected himself in stating that the defence was an afterthought. The defence could not be said to be an afterthought or a recent invention as the defence was put to the prosecution witnesses. Throughout the proceedings, the first appellant was consistent in his defence that he had no knowledge of the drugs; that he was merely collecting the sample from Christina as requested by Emmky; and that Vincent knew about this request. (paras 23 & 25)

(3) The significance of Vincent as a witness was not in respect of the narratives during the arrest and seizure but in respect of whether he could confirm the first appellant's version that the meeting with Christina was at the request of Emmky in relation to the samples, which could lend credence to the first appellant's version that he knew nothing about the drugs. Vincent was thus not a material witness and the failure to call or to offer Vincent for cross-examination did not attract the adverse inference under s. 114(g) of the Act. (para 33)

(4) There were no merits in the argument that there was a mix up of the drugs exhibits. There was no break in the chain of evidence. Hence, there was no necessity to consider the issue of s. 34 of the Penal Code raised by the first appellant, pertaining to the need for the trial judge to view the evidence against each appellant separately since the original charge under the said provision had been amended. (paras 34 & 35)

(5) In respect of the second appellant, the ground of appeal put forth was that the trial judge had failed to evaluate his defence that he merely accompanied the first appellant to the place. There did not seem to be a need for the trial judge to evaluate the defence, having found that it was one of an afterthought and a recent invention. The defence of the second appellant was not inherently incredible. His explanation on the sandals filled with drugs was a reasonable explanation. It was incumbent upon the trial judge to weigh the defence in a proper perspective which His Lordship had failed to do. (paras 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Satu pengawasan telah dijalankan oleh pasukan polis ke atas sebuah hotel dan perayu-perayu dan tertuduh ketiga dilihat keluar dari hotel tersebut. Perayu-perayu pertama dan kedua, masing-masing dilihat membawa beg plastik merah jambu dan hitam sementara tertuduh ketiga dilihat berjalan di belakang kedua-dua lelaki tersebut. Ketiga-tiga mereka menaiki teksi dan pihak polis mengekori teksi tersebut hinggalah ia berhenti di hadapan sederet rumah kedai di mana kesemua mereka kemudiannya ditangkap. Empat dan dua bungkusan dijumpai dalam beg merah jambu dan hitam, masing-masing. Empat pasang sandal dijumpai daripada dua beg tersebut dan di bawah sandal-sandal tersebut, pihak polis menjumpai satu lapisan di mana lapan bungkusan berwarna kuning yang dibungkus dengan pita pelekat dijumpai. Kelapan-lapan bungkusan tersebut mengandungi bahan-bahan yang kemudiannya disahkan oleh ahli kimia sebagai methamphetamine. Methamphetamine tersebut dijumpai dalam beg merah jambu dan hitam tersebut yang masing-masing seberat 683.7g dan 727.1g. Kedua-dua perayu dan tertuduh ketiga dituduh di bawah s. 39B(2) Akta Dadah Berbahaya 1952 bagi kesalahan mengedar dadah berbahaya. Di akhir kes pendakwaan, hakim bicara mendapati bahawa elemen niat bersama tidak dibuktikan dan tertuduh ketiga dilepaskan dan dibebaskan. Walau bagaimanapun, hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu-perayu. Pembelaan perayu pertama adalah bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah tersebut; dan bahawa dia telah mengambil sampel tersebut daripada seorang yang bernama Christina atas permintaan seorang lagi yang bernama Emmky dan Vincent, saudara ipar Emmky,

mengetahui akan perkara ini. Perayu kedua, sebaliknya, menafikan mengenali Emmky mahupun Christina. Menjadi hujahan perayu bahawa mereka telah bertemu secara kebetulan dan perayu kedua telah bersetujuu untuk turut serta perayu pertama. Hakim bicara membuat dapatan *mens rea* milikan dengan bersandarkan pada perilaku perayu-perayu untuk membuat kesimpulan bahawa mereka mempunyai pengetahuan mengenai dadah-dadah tersebut. Diputuskan selanjutnya bahawa pembelaan gagal membangkitkan keraguan munasabah ke atas kes pendakwaan dan mahkamah bicara mensabitkan perayu-perayu bagi kesalahan dan menjatuhkan hukuman mati ke atas mereka. Oleh itu, rayuan ini. Isu-isu yang dikemukakan oleh perayu pertama adalah (i) sama ada hakim bicara telah membuat dapatan yang betul mengenai inferens pengetahuan perayu pertama berdasarkan perilaku; (ii) hakim bicara khilaf dalam undang-undang dan fakta apabila membuat dapatan bahawa pembelaan adalah satu fikiran semula dan rekaan baharu; (iii) bangkitan s. 114(g) Akta Keterangan 1950 ('Akta') akibat tidak memanggil dan tidak menawarkan Vincent; dan (iv) identiti ekshibit-ekshibit dan s. 34 Kanun Keseksaan. Aduan perayu kedua adalah bahawa hakim bicara gagal mempertimbangkan pembelaan perayu kedua bahawa dia sekadar menemankan perayu pertama ke hotel.

Diputuskan (membenarkan rayuan-rayuan dan mengetepikan sabitan; melepaskan dan membebaskan perayu-perayu)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Dalam keadaan di mana pihak polis tiba-tiba menangkap perayu pertama dalam teksi, adalah munasabah untuk menjangka bahawa perayu pertama akan memberi reaksi terperanjat. Tindakan sedemikian tidak mencukupi untuk menyimpulkan mengenai pengetahuan tentang dadah-dadah tersebut. Bagi perayu kedua pula, tiada keterangan untuk menunjukkan sebarang situasi yang membolehkan perayu kedua untuk lari daripada pihak polis. Tiada asas bagi hakim bicara untuk membuat dapatan bahawa perayu kedua boleh melarikan diri kerana situasi tersebut tidak memungkinkan dia berbuat sedemikian.

(2) Hakim bicara tersalah arah diri beliau dalam menyatakan bahawa pembelaan adalah satu fikiran semula. Pembelaan tidak boleh dikatakan satu fikiran semula atau rekaan baharu kerana

pembelaan telah diajukan kepada saksi-saksi pendakwaan. Sepanjang prosiding, perayu pertama konsisten dalam pembelaannya bahawa dia tidak mempunyai pengetahuan mengenai dadah-dadah tersebut; bahawa dia sekadar mengambil sampel daripada Christina atas permintaan Emmky; dan bahawa Vincent tahu akan permintaan ini.

(3) Kepentingan Vincent sebagai saksi bukanlah berkaitan naratif semasa tangkapan dan rampasan tetapi berkaitan sama ada dia boleh mengesahkan versi perayu pertama mengenai perjumpaan dengan Christina adalah permintaan Emmky bagi sampel-sampel, yang boleh memberi kepercayaan kepada versi perayu pertama bahawa tidak tahu mengenai dadah-dadah tersebut. Vincent oleh itu bukan saksi material dan kegagalan untuk memanggil atau menawarkan Vincent bagi pemeriksaan balas tidak menarik anggapan bertentangan di bawah s. 114(g) Akta.

(4) Tiada merit dalam hujahan bahawa terdapat kekeliruan mengenai ekshibit-ekshibit dadah. Tiada pemutusan dalam rantaian keterangan. Oleh itu, tiada keperluan untuk mempertimbangkan isu s. 34 Kanun Keseksaan yang dibangkitkan oleh perayu pertama, berkenaan keperluan hakim bicara untuk melihat keterangan setiap perayu secara berasingan memandangkan bahawa pertuduhan asal di bawah peruntukan tersebut telah dipinda.

(5) Berkenaan perayu kedua, alasan rayuan yang dikemukakan adalah bahawa hakim bicara gagal mempertimbangkan pembelaannya bahawa dia sekadar menemankan perayu pertama ke tempat tersebut. Tiada keperluan untuk hakim bicara mempertimbangkan pembelaan, setelah memutuskan bahawa ia adalah fikiran semula dan satu rekaan baharu. Pembelaan perayu kedua bukanlah secara sedia adanya tidak kredibel. Penjelasannya mengenai sandal-sandal yang penuh dengan dadah-dadah tersebut adalah penjelasan yang munasabah. Adalah menjadi kewajipan hakim bicara untuk mempertimbangkan pembelaan dalam perspektif yang betul yang mana Yang Arif gagal berbuat sedemikian.

Case(s) referred to:
Kamalahassan Latchimanan v. PP [2008] 4 CLJ 794 CA ***(refd)***
Masoumeh Gholami Khaveh v. PP [2013] 5 CLJ 59 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Pang Chee Meng v. PP 1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(2)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

For the 1st appellant - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs
For the 2nd appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Awang Armadajaya Awang Mahmud; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Saabani Kigongobero & Ors [2012] 1 LNS 844.]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun JCA:

[1] The appellant in W-05-287-11-2012 (hereinafter referred to as the first appellant) and the appellant in W-05-288-11-2012 (hereinafter referred to as the second appellant) were the first accused and the second accused respectively in the High Court. Both appellants, together with one Ling Yue (the third accused) were charged under s. 39B(2) of the Dangerous Drugs Act 1952 for trafficking in 1,410.8g methamphetamine read together with s. 34 of the Penal Code.

[2] The facts relevant to the appeal are briefly set out below. On 2 January 2011 at about 5pm, a team of police officers had laid surveillance at Hotel Dragon Inn, Jalan Petaling, Kuala Lumpur. They saw the appellants and the third accused coming out of the hotel. The first appellant was seen carrying a pink plastic bag while the second appellant, a black plastic bag. The third accused was seen walking behind the two men. The three boarded a taxi, driven by SP4. The first appellant was seated in

the front passenger seat. The second appellant and the third accused were at the back passenger seat. The police team tailed the taxi until it stopped in front of a row of shop houses beside Jalan Dutamas Seroja 3.

[3] When the second appellant and the third accused alighted from the taxi, walking towards the shop houses, they were arrested by the police. The black bag was seized from the second appellant. The first appellant was arrested whilst he was inside the taxi, paying for the fare. From the foot well of the front passenger's seat, the police seized the pink bag.

[4] Inside both the pink bag and the black bag, the police found four packages, two packages in each bag. Each package contained a pair of sandals brand "Y&Y". Four pairs of sandals were thus recovered from the two bags. Inside the black bag, there was also a pair of high-heeled ladies shoe. Underneath the sandals, the police found a layer from where eight yellow packages wrapped in cellophane tape were recovered. The eight packages contained substances which were later confirmed by the Chemist (SP3) to be methamphetamine. The methamphetamine recovered from the pink bag weighed 683.7 grams and from the black bag, the weight was 727.1 grams.

[5] The police team was later led to the residence of the first appellant and the second appellant at Menara Manjalara, Bandar Manjalara, Kepong and at Condo Anggun Putri, Segambut respectively. The police did not find anything illegal in the said houses. However, to facilitate investigations, the police arrested Anyoujo @ Ambrose at the second appellant's house and Vincent at the first appellant's house.

[6] At the end of the prosecution's case, the learned trial judge found that the element of common intention had not been proved. The learned trial judge acquitted and discharged the third accused. As against the appellants, the learned trial judge found that the prosecution had proven a *prima facie* case in respect of the drugs found in the plastic bags carried by them separately and individually. The charge was thus amended by the learned trial judge to omit s. 34. The two appellants were called upon to enter their defence on the amended charge.

A **The Defence**

[7] The first appellant, from Uganda, came to Malaysia in July 2010 to study and he stayed alone at Menara Menjalara until 27 December 2010 when Vincent, the brother-in-law of a friend
B named Emmky, joined him. On 27 December 2010, the first appellant received a call from Emmky asking the first appellant to assist in retrieving a sample from someone to be handed over to another friend in Dutamas to be brought back to Africa. Emmky did not specify the kind and the number of sample that was to
C be taken.

[8] On 31 December 2010 the first appellant received a phone call from Emmky reminding him to collect the sample. According to the first appellant, at that time Vincent was with him and Vincent was aware about the request that Emmky made to him.
D On 2 January 2011 the first appellant went to a church in Kepong for a New Year Mass. He then received a call from Emmky asking him to meet a Latvian lady by the name of Christina at room No. 204, Hotel Dragon Inn, Petaling Street.

E **[9]** After coming back from the church, the first appellant called the second appellant to wish him on the New Year. It happened that the second appellant was at KFC Kepong with the third accused. He went to meet the second appellant at KFC Kepong. He told the second appellant that he wanted to go to
F Hotel Dragon Inn at Petaling Street. Since the second appellant was familiar with the area, all three of them took a taxi to Petaling Street. The first appellant was aware that at that time, the second appellant was carrying a black plastic bag.

G **[10]** The taxi dropped them at Petaling Street and they walked to Dragon Inn Hotel. On arrival at Dragon Inn, they went to room 204. The first appellant knocked the door and a white lady who introduced herself as Christina opened the door. The first appellant then called Emmky and passed the mobile telephone to
H Christina. The first appellant heard the word "okay" uttered by Christina many times over. He did not hear anything else. When Christina handed over the telephone back to him, he spoke to Emmky. Emmky had asked him to take the sample and bring it to Dutamas and to hand it over to someone who will call him later.

I

[11] Christina took two pairs of sandals and put them into a pink bag and handed the pink bag to the first appellant. As the pink bag could not contain all the sandals that were taken out by Christina, she put another two pairs into the black bag carried by the second appellant. They then left the hotel.

[12] They took another taxi to Dutamas. Throughout the journey the first appellant did not receive any calls from Emmky or his friend. Upon arrival at Dutamas, he instructed the taxi driver to stop in front of a row of shop houses to buy a mobile telephone reload card to make a call to Emmky. When he was arrested, he did inform the police about the samples, Emmky and Christina. Only after the appellants and the third accused were taken to the police station that the first appellant knew the sandals were filled with drugs. The first appellant also told the police that the second appellant was merely following him to the place.

[13] The second appellant, a Nigerian, gave evidence on the black plastic bag that he was carrying. His testimony was that prior to going to KFC Kepong, he and the third accused, who was his girlfriend, had gone to BB Plaza at Bukit Bintang. Because of the shoes she was wearing, the third accused had pains in her legs. The second appellant then bought her a pair of slippers. She changed to the new slippers. Her high heeled shoes were put in the box in a black plastic bag and he had with him at all times the black plastic bag and the box from the shoe shop.

[14] The second appellant's version was consistent with the first appellant on the meeting at KFC Kepong; on the meeting with Christina at the hotel; on the two pairs of sandals given to the first appellant in the pink plastic bag; and on the two pairs of sandals given to him as they could not fit into the pink plastic bag. The second appellant's version was also consistent with the first appellant on the evidence that the taxi driver was asked to stop for the first appellant to reload his mobile to call his friend about the sample. The second appellant similarly said that he had no knowledge that there were drugs in the two sandals that he was carrying in the plastic bag.

[15] The third accused gave evidence on behalf of the defence. She confirmed the second appellant's version of the trip to BB Plaza; the shoes and the new slippers; the meeting with the first

appellant at KFC Kepong; the trip to Petaling Street; the meeting with Christina at Hotel Dragon Inn and the stop in front of the shop houses at Dutamas for the first appellant to buy a (reload) card. It was further her evidence that she had never seen the second appellant with drugs.

[16] The learned trial judge found that the defence has failed to raise a reasonable doubt on the prosecution case. The appellants were thus convicted and sentenced to death.

The Appeal

[17] Before us, learned counsel for the first appellant canvassed the following grounds of appeal:

(i) whether the learned trial judge had made a correct finding of inference of knowledge upon the first appellant based on conduct;

(ii) that the learned trial judge erred in law and in fact in finding that defence was an afterthought and a recent invention;

(iii) the invocation of s. 114(g) of the Evidence Act 1950 by the non-calling and non-offering of Vincent; and

(iv) the identity of exhibits and s. 34 of the Penal Code.

[18] The second appellant's complaint was that the learned trial judge had failed to appreciate the defence of the second appellant that he had merely accompanied the first appellant to the hotel. Learned counsel for the second appellant adopted the submission of learned counsel for the first appellant in respect of the other issues raised.

Conduct And The Inference Of Knowledge

[19] The learned trial judge had made a finding of *mens rea* possession and proceeded to find trafficking under s. 37(da) of the Dangerous Drugs Act 1952. In finding that the prosecution had proved possession, the learned trial judge relied on the conduct of the appellants to infer that the appellants had knowledge of the drugs in the sandals. This is what the learned trial judge said:

> [45] ... Tertuduh Pertama cuba untuk melarikan diri daripada ditangkap setelah SP6 memperkenalkan diri sebagai pegawai polis dan cuba menangkap beliau. Tertuduh Kedua masa ditangkap walaupun tiada pergelutan dan gagal melarikan diri

tidak bermakna tiada pengetahuan tentang dadah oleh kerana situasi ketika itu tidak memungkinkan beliau untuk melarikan diri ...

[20] The evidence established that prior to the arrest, when the appellants were seen coming out of the hotel, the appellants were not behaving suspiciously. At the time of the arrest, a perusal of the evidence of the taxi driver (SP4) and the arresting officer (SP6) revealed that the arrest on the first appellant happened very fast. He was pulled out of the taxi whilst he was making payment for the fare. The evidence of SP6 was "Masa membuka pintu saya kenalkan diri sebagai polis dan dia terkejut kemudian saya kilas tangan kirinya dia cuba melawan kemudian saya tarik dia keluar dan tiarapkannya di atas jalan." The evidence suggests that there was no opportunity for the first appellant to run away. In a situation where the police had suddenly pounded on the first appellant in the taxi, it is reasonable to expect the first appellant to display the reaction of 'terkejut'. In fact SP6 admitted that 'terkejut' was a reasonable reaction. Therefore, in our view, such conduct alone is not sufficient to infer knowledge of the drugs on the first appellant.

[21] As for the second appellant, there was no evidence of any resistance on the arrest or any attempt to run away. The evidence of SP8 was ".. OKT2 selepas saya kenalkan diri sebagai polis dia tak ada baling beg dan tak cuba larikan diri." Naturally, there was no evidence led to suggest any situation that made it impossible for the second appellant to run away from the police. There was thus no basis for the learned trial judge to make a finding that the second appellant could not run away because the situation made it impossible for him to do so.

Defence An Afterthought/Recent Invention

[22] The learned trial judge's evaluation of the defence is as follows:

[44] Daripada keterangan saksi-saksi pembelaan, nampaknya pembelaan Tertuduh Pertama dan Tertuduh Kedua dalam kes ini adalah bahawa mereka hanyalah "innocent carrier". Mereka bersama-sama menyatakan bahawa mereka langsung tidak mempunyai pengetahuan tentang dadah-dadah yang tersorok di dalam tapak sandal-sandal yang mereka bawa

pada masa tangkapan. Mereka menyatakan telah menerima sandal-sandal tersebut daripada seorang wanita bangsa Latvia bernama Christina di Hotel Dragon Inn untuk dihantar kepada seorang kawan Emmky di Dutamas untuk dihantar ke Afrika Selatan sebagai sampel. Keterangan Tertuduh Pertama dan Tertuduh Kedua mengenai perkara material dalam keterangan mereka telah disokong oleh keterangan Ling Yue. Kedua-dua Tertuduh menafikan mereka sedar terlibat dalam pengedaran dadah syabu yang hal perkara pertuduhan terhadap mereka.

[45] Selepas meneliti keseluruhan keterangan yang dikemukakan di hadapan Mahkamah ini, saya dapati bahawa pihak pembelaan telah gagal untuk menimbulkan sebarang keraguan yang munasabah terhadap kebenaran kes pihak pendakwaan. Keterangan saksi pendakwaan jelas menunjukkan bagaimana Tertuduh-Tertuduh yang dilihat masing-masing memegang sebuah beg plastik berisi sandal-sandal yang digunakan untuk menyorok dadah-dadah berbahaya sambil berjalan keluar dari Hotel Dragon Inn, menaiki teksi dan akhirnya ditangkap bersama bag masing-masing yang berisi dadah di Dutamas Saroja 3. ...

[46] Keterangan Tertuduh-Tertuduh bahawa sandal-sandal tersebut sebagai sampel tidak menyakinkan dan tidak boleh dipercayai. Sekiranya benar sandal-sandal tersebut untuk dijadikan sebagai sampel mengapakah memerlukan empat pasang sandal dalam jenama Y&Y yang serba serbinya sama dari segi rupabentuk, sais, patent dan sebagainya sama. Jika sandal-sandal tersebut hendak dijadikan sebagai sampel, satu pasang sudah memadai dan tidak perlu empat pasang sandal yang sama. Dari sini tidakkah timbul sesuatu yang aneh kepada Tertuduh-Tertuduh untuk memeriksa dan meneliti sandal-sandal yang diberikan oleh Christina tersebut kepada mereka. Oleh itu pembelaan "innocent carrier" oleh Tertuduh-Tertuduh tidak dapat dipercayai dan tidak boleh diterima oleh Mahkamah ini.

[47] Cerita Tertuduh Pertama bahawa kawan beliau bernama Emmky yang meminta tolong beliau ambilkan sampel. Beliau tidak tahu apakah sampel tersebut sehinggalah ianya ditunjukkan oleh Christina dibilik Hotel Dragon Inn. Pada masa itu barulah Tertuduh Pertama tahu sampel tersebut adalah 4 pasang sandal yang serupa. Cerita Tertuduh Pertama ini juga tidak munasabah oleh kerana beliau hanyalah seorang kawan kepada Emmky sedangkan Vincent adalah

adik ipar kepada Emmky tinggal bersama Tertuduh Pertama. Mengapakah seorang adik iparnya tidak terlibat atau tidak disuruh oleh abang iparnya sendiri iaitu Emmky untuk melakukan tugas tersebut. Persoalan ini tidak dapat dijelaskan oleh Tertuduh Pertama. Sekiranya benar Emmky wujud maka sudah tentu beliau lebih mengharapkan atau lebih mempercayai Vincent untuk melakukan kerja mengambil sampel tersebut dan bukannya Tertuduh Pertama.

[48] Setelah meneliti keterangan saksi-saksi pihak pembelaan, terdapat banyak kejadian yang berlaku secara kebetulan. Secara kebetulan mereka bertemu di KFC Kepong, kebetulan Tertuduh Kedua tahu Petaling Street, kebetulan tiada kredit untuk panggil Emmky dan sebagainya. Pembelaan sedemikian rupa adalah pembelaan yang lemah dan tidak menimbulkan keraguan terhadap kes pendakwaan. ...

[49] Saya mendapati pembelaan Tertuduh-Tertuduh hanyalah rekaan semata-mata dan hanyalah satu pemikiran terkemudian. Cerita Tertuduh-Tertuduh mengenai Emmky, Christina dan sample tidak boleh dipercayai. Oleh itu pembelaan Tertuduh-Tertuduh adalah tidak benar, tidak dapat diterima, rekaan semata-mata, recent invention dan satu afterthought. Pembelaan sedemikian tidak dapat melepaskan Tertuduh-Tertuduh daripada pertuduhan yang mereka hadapi [lihat *PP v. Lim Lian Chen* [1992] 2 MLJ 561, *Wong Swee Chin v. PP* [1980] 1 LNS 138, *Hamidon bin Mat Yatin v. PP* [1995] 3 CLJ 735 dan *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324]."

[23] Throughout the proceedings, the first appellant was consistent in his defence that he had no knowledge of the drugs; that he was merely collecting the sample from Christina as requested by Emmky and that Vincent knew about this request. This version was put to the prosecution witnesses SP5, SP6, SP7 and SP8. Except for SP8, the prosecution witnesses denied that they knew about Christina. As for SP8, the following was his evidence in cross-examination:

Q: Saya katakan taklimat ada nyatakan ada seorang yang menyewa, bukan OKT1, 2 & 3 di Hotel Dragon Inn tersebut; betul?

A: Ya.

Q: Saya katakan bahawa orang yang menyewa di hotel tersebut bernama Christina, seorang perempuan Latvia, betul?

A: Betul

In re-examination, SP8 said "Dalam pemeriksaan balas sebentar tadi saya bersetuju yang dalam taklimat itu ada beritahu seorang wanita warga Latvia bernama Christina tinggal di hotel itu sebab tadi tidak jelas pertanyaan itu.

[24] We find it hard to accept the clarification of SP8 above. What was asked of him about Christina was not a convoluted question. It was a short and straight forward question to which he had given a short and straight answer. It would seem to us that his answer in re-examination was to rectify what had been said in cross-examination.

[25] In *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 the Federal Court had stated the general rule that failure of a defence to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. Applying the general rule aforesaid, it is the duty of the defence to put their case to the prosecution witnesses and failure to do so will render the defence being labelled as an afterthought or a recent invention. In the present case, the defence could not be said to be an afterthought or a recent invention as the defence was put to the prosecution witnesses. The learned trial judge had therefore seriously misdirected himself in stating that the defence was an afterthought and a recent invention.

[26] Further, it must be highlighted that the evidence of the first appellant was that he did inform the police about Christina and Emmky and about the fact that Vincent knew about his conversation with Emmky and the request to collect the sample for Emmky. Obviously no investigation was conducted on Christina as except for SP8, the prosecution witnesses said that they had no knowledge of Christina and although Vincent (a South African national) was arrested, he was later deported for having previous criminal record. The first appellant had thus lost the opportunity of any evidence from Vincent that could corroborate his version particularly on the request by Emmky for him to collect the sample, which evidence could cast a reasonable doubt on the prosecution's case. As stated in *Pang Chee Meng v. PP* 1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137 the accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

[27] As regards Christina, it was the submission of learned Deputy Public Prosecutor that the police had no information about her and that there was no disclosure from the first appellant on Christina and this goes to the veracity, accuracy and truthfulness of the defence. Learned deputy further submitted that if the first appellant was serious in his defence, Emmky and Christina would have been disclosed to the police at investigation stage.

[28] We bear in mind the principle that an accused person has the right to remain silent. Be that as it may, at this juncture we think it is pertinent to refer to the cautioned statement of the appellants and the third accused where we noted that notwithstanding the fact that different police officers recorded the cautioned statements, the questions and answers found in the respective cautioned statements (exhs. D50, D51 and D52) are word for word the same which consist of only seven questions and to the question asked "Do you give this statement to me voluntarily" the answer was "Im not understand what you say." There was no question asked of Hotel Dragon Inn or Dutamas in the cautioned statements. In the circumstances, even if we were to accept that the first appellant did not make any disclosure on Christina, surely the first appellant could not be faulted for lack of any disclosure or statement, given the manner the questions were posed to him.

[29] In respect of the second appellant, the ground of appeal put forth was that the learned trial judge had failed to evaluate his defence that he merely accompanied the first appellant to the place.

[30] Indeed, there does not seem to be a need for the learned trial judge to evaluate the defence having found that it was one of an afterthought and a recent invention. However, the learned trial judge had made a finding that the prosecution has failed to prove common intention. The second appellant did not know Emmky or Christina. Absent any pre-arranged plan between the appellants to go to the hotel and Dutamas to traffic in dangerous drugs, the appellants' version that the meeting at KFC Kepong was by chance and that the second appellant had agreed to go along with the first appellant to Petaling Street as he was familiar with the area coupled with the fact that the appellants' version as

to the sequence of events on the particular day was corroborated by the third accused, we are of the view that the defence of the second appellant is not inherently incredible. His explanation on the sandals filled with drugs was a reasonable explanation. It is thus incumbent upon the learned trial judge to weigh the defence in the proper perspective, which His Lordship has failed to do.

Invocation Of s. 114(g) Evidence Act 1950

[31] It was not in dispute that Vincent was arrested at the first appellant's house and was brought to the police station together with the appellants. Although from the beginning it was put to the prosecution witnesses that Vincent knew of the request by Emmky, Vincent was not called by the prosecution nor offered to the defence. Citing the case of *Masoumeh Gholami Khaveh v. PP* [2013] 5 CLJ 59 (Mahkamah Rayuan Rayuan Jenayah No. B-05-213-08/2011), it was the submission of learned counsel for the first appellant that the learned trial judge had misdirected himself in law and in fact in brushing aside the issue of Vincent on the ground that he was not present during the arrest.

[32] The finding by the learned trial judge on this issue was as follows:

> [32] ... peguambela berhujah Vincent, Anyoujo @ Ambrose dan Christina adalah saksi-saksi penting dalam kes ini. Kegagalan pihak pendakwaan untuk memanggil dua penama tersebut telah mencacatkan kes pendakwaan dan boleh menarik pemakaian anggapan di bawah seksyen 114(g) Akta Keterangan 1950. Dengan hormatnya, pihak pendakwaan mempunyai budi bicara dalam memanggil mana-mana saksi untuk membuktikan pertuduhan terhadap tertuduh. ... Pihak pendakwaan telah menjelaskan bahawa penama Christina tidak disiasat oleh kerana kekurangan maklumat diberikan oleh tertuduh-tertuduh. Penama Christian dan Anyoujo @ ambrose tidak penting untuk kes pendakwaan dan tidak dipanggil atau ditawarkan oleh kerana dua saksi itu tidak berada di tempat kejadian. Sekiranya dua penama dipanggil pun mereka hanya dapat mengesahkan bahawa Tertuduh Pertama dan Tertuduh Kedua tidak membawa sebarang beg semasa keluar dari rumah. Tertuduh-Tertuduh tersebut telah ditangkap di Dutamas Seroja 3 bersama-sama dengan beg mengandungi dadah. Dua penama tersebut tidak mempunyai sebarang pengetahuan tentang kejadian tangkapan dan rampasan tersebut. Oleh itu pihak pendakwaan tidak dalam kedudukan untuk

menghalang atau menyembunyikan apa-apa fakta mengenai tangkapan dan rampasan barang kes dalam kes ini. Oleh itu anggapan di bawah seksyen 114(g) Akta Keterangan 1950 tidak boleh terpakai terhadap pihak pendakwaan atas kegagalan untuk memanggil atau menawarkan tiga penama tersebut.

[33] The learned trial judge came to the conclusion that Vincent, Christina and Anyoujo were not material witnesses because they were not at the scene when the appellants were arrested and when the drugs were seized. We agree that the aforesaid names were not material witnesses insofar as the events which took place on the arrest and the seizure are concerned. However, the significance of Vincent, in particular, as a witness was not in respect of the narratives during the arrest and the seizure but in respect of whether he could confirm the first appellant's version that the meeting with Christina was at the request of Emmky in relation to the samples, which could lend credence to the first appellant's version that he knew nothing about the drugs. Viewed in that context, we do think that Vincent is a material witness and the failure to call or to offer Vincent for cross-examination attracts the adverse inference under s. 114(g) of the Evidence Act (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492; *Kamalahassan Latchimanan v. PP* [2008] 4 CLJ 794; [2008] 3 MLJ 810).

[34] On the exhibits, the essence of the argument by learned counsel for the first appellant was that there was a mixed up of the drug exhibits received by SP3 where SP3 had received other exhibit in relation to another police report. Having gone through the evidence of SP3, we find no merits in the ground raised by the first appellant. We are satisfied that there was no break in the chain of evidence. Lastly, we find no necessity to consider the issue of s. 34 raised by the first appellant, pertaining to the need for the learned trial judge to view the evidence against each appellant separately, now that the original charge under s. 34 has been amended.

[35] To conclude, except for the issue on exhibits, we find that there are merits in the appeals. Looking at the whole circumstances of the case, we do not think that the convictions of the appellants are safe. We unanimously allowed the appeals and set aside the convictions. The appellants are acquitted and discharged.